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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A. G.,
Petitioner,

v.

STERLING DRUG INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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January 10, 1963.

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Sterling Drug Inc., respondent herein, respectfully submits that the Petition for a Writ of Certiorari in this case should be denied for the reasons hereinafter set forth.

Opinions Below.

The opinion of the United States Court of Appeals for the Third Circuit, filed August 9, 1962, is reported at 307 F. 2d 207 and is annexed as Appendix A to the Petition.

The opinion of the United States District Court for the District of New Jersey, filed July 27, 1961, is reported at 197 F. Supp. 613, is annexed to the Petition as Exhibit B, and appears at pages 268a-92a of the printed Appendix prepared by petitioner for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4).

Questions Presented.

1. Should this Court grant certiorari to review a unanimous decision of the Court of Appeals affirming, on a single ground, a District Court decision which dismissed petitioner's complaint upon that ground and upon alternative and independently valid grounds?

2. Should this Court grant certiorari to review such a decision where, in addition to the grounds on which the courts below relied, respondent is exempted from liability by the provisions of (a) the Trading with the Enemy Act and (b) the Bonn Convention of 1952 with the Federal Republic of Germany because the acts of which petitioner complains were performed by respondent at the direction of the United States Government as part of a program of economic warfare against Germany following the commencement of World War II in Europe?

3. Did the Court of Appeals err in affirming dismissal of petitioner's complaint on the ground that it seeks a share of the profits arising under a contract which was admittedly illegal under the United States antitrust laws?

4. Does the decision of the Court of Appeals have an undesirable effect upon commercial relationships between American and foreign companies where the record demonstrates that (a) the contract establishing the relationship in the present case was illegal in its entirety under American antitrust laws and (b) respondent, the American company, has not since termination of the relationship retained any properties provided by the foreign company?

Introduction.

Petitioner, Farbenfabriken Bayer A. G. (herein called "Farben"*), is a corporation organized under the law of the Federal Republic of Germany (App.** 60a). On September 28, 1955, it filed this action against respondent, Sterling Drug Inc. (formerly Sterling Products Incorporated]; herein called "Sterling"***), a corporation organized under the law of the State of Delaware, for relief arising out of an alleged relationship between the predecessors of the present parties in the conduct of an aspirin business in Latin America (App. 5a-21a). That business was conducted pursuant to an agreement executed in 1920 (herein called the "1920 Contract") (App. 15a-21a), which eliminated competition in Latin America between said predecessors in sales of aspirin and aspirin products. It is undisputed that the 1920 Contract violated section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. §1 (1958).

On February 5, 1957, the District Court filed an opinion dismissing this action without prejudice on the ground that Farben was still an enemy alien with respect to the subject

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* "Farben" is also used herein to refer, individually and collectively, to both petitioner and its alleged predecessors, I. G. Farbenindustrie A. G. (herein also called "I. G. Farben") and Farbenfabriken vorm. Friedrich Bayer & Company, both German corporations. The alleged succession is disputed by respondent but was conceded for the purposes of respondent's motion for summary judgment.

** "App." is used herein to refer to the printed Appendices prepared by the parties for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). "Pet." and "Pet. App." are used herein to refer, respectively, to the Petition and to the opinions of the Court of Appeals and the District Court which are annexed as Appendix A and Appendix B to the Petition.

*** "Sterling" is also used herein to refer, individually and collectively, to both respondent and its predecessor, The Bayer Company, Inc., a New York corporation.

matter of its claims, and as such was disqualified to enforce them in an American court, 148 F. Supp. 733 (App. 46a-51a). That decision was reversed by the United States Court of Appeals for the Third Circuit in an opinion filed January 2, 1958, 251 F. 2d 300 (App. 51a-58a). A petition for a writ of certiorari was denied by this Court, 356 U. S. 957.

After remand, Sterling moved, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment in the District Court on June 1, 1958 (App. 59a-60a).

The District Court postponed oral argument and decision of Sterling's motion while it conducted certain pretrial proceedings. As a result of those proceedings, Farben and Sterling joined in a lengthy and detailed stipulation of fact (App. 60a-138a). The facts on which Sterling relies in support of its motion are taken from that stipulation, the complaint and certain public records.

Thereafter, on October 29, 1959, a motion pursuant to Rule 56 for summary judgment was also filed by Farben (App. 139a-40a).

In an opinion filed July 21, 1961 (App. 268a-92a; Pet. App. 8a-34a), the District Court granted Sterling's motion and entered final judgment in Sterling's favor (App. 292a-93a). It held that Farben's claims were barred because (1) they seek payment of a share of the profits of an admittedly unlawful enterprise, (2) they seek relief which would require Sterling to violate the provisions of the decree entered against it in *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,150 (S. D. N. Y. 1941) (App. 21a-31a), and (3) the complaint was filed long after the period prescribed by the applicable statute of limitations and the doctrine of laches. Farben's motion was dismissed without opinion (App. 293a).

An appeal was taken by Farben to the United States Court of Appeals for the Third Circuit, which, on August 9, 1962, filed a unanimous opinion affirming the judgment of the District Court (Pet. App. 1a-7a). The Court of Appeals did not discuss the applicability of the *Alba* decree, the statute of limitations or the doctrine of laches. It held simply that each of the four causes of action in the complaint sought enforcement of the provisions of an illegal contract which was not a joint venture, and, as such, was barred.

A Petition for Rehearing or, in the Alternative, for Clarification was denied by the Court of Appeals without opinion on September 11, 1962.

Counter-Statement of the Case.

Petitioner succeeded in 1953 to part of the pharmaceutical business conducted by I. G. Farben from 1926 to 1953 (App. 60a). I. G. Farben had succeeded in 1926 to the business conducted from 1863 to 1925 by Farbenfabriken vorm. Friedrich Bayer & Company (*ibid.*).

In 1913 Farbenfabriken vorm. Friedrich Bayer & Company caused the incorporation of a wholly-owned subsidiary, The Bayer Company, Inc. (herein called "Bayer"), under the law of the State of New York (App. 61a). Bayer's business included the manufacture and sale of aspirin in the United States (App. 6a).

In January 1918, after the United States had declared war on Germany, all of the assets of Farbenfabriken vorm. Friedrich Bayer & Company in the United States, including the capital stock of Bayer, were vested by the United States Alien Property Custodian pursuant to the Trading with the Enemy Act, 40 Stat. 416 (1917), as amended, 50 U. S. C. App. §7(c) (1958) (App. 62a).

In December 1918, the Alien Property Custodian sold all of the vested assets of Farbenfabriken vorm. Friedrich Bayer & Company, including the capital stock of Bayer, to Sterling at public auction pursuant to authority conferred by the Act, 40 Stat. 423 (1917) (amended by 40 Stat. 460 (1918)), as amended, 50 U. S. C. App. §12 (1958) (App. 62a). Sterling thereafter operated Bayer as a subsidiary until its merger into Sterling as of December 31, 1942 (App. 61a).

The 1920 Contract.

At some time prior to 1920, Bayer had begun the sale of aspirin and aspirin products in Latin America (App. 7a, 15a-16a). In 1920, after more than a year of negotiations, Farben and Bayer entered into the 1920 Contract, which, as previously stated, eliminated competition between the parties in such sales in Latin America for the 50-year term of the contract (App. 15a-21a, 62a).

Under the agreement Farben acquired ownership of all of Bayer's Latin American trademarks and trade names relating to those products and exclusively licensed their use, together with the use of the same or other trademarks held by Farben in various Latin American countries, to Bayer (App. 15a, 16a). Bayer thereafter conducted the aspirin business entirely with its own capital in accordance with the agreement (App. 63a-65a). The contract gave Farben no voice in management of the business.

In so doing, Bayer was required under the agreement to utilize local agencies of the German company wherever possible (App. 16a, 63a-65a). Bayer was also required to purchase its requirements of aspirin powder from Farben if the latter's cost of manufacturing were lower than Bayer's (App. 16a). Farben, which neither risked capital in the enterprise nor shared in its losses but which then owned the

all-important trademarks, received 75% of the profits and Bayer received 25% (App. 16a, 65a).

The contract contained no provision for the continued use by Sterling of Farben's trademarks after its termination, nor did it provide that Farben was to receive anything from Sterling upon such termination.

The 1923 Contracts.

In April of 1923, Farben and Sterling and certain of its then affiliates or subsidiaries entered into several agreements (herein called "the 1923 Contracts") (App. 62a-63a), which have been described as "the usual form of international cartel arrangement", *General Aniline & Film Corp.* v. *The Bayer Co.*, 188 Misc. 929, 930, 64 N. Y. S. 2d 492 (Sup. Ct. N. Y. Co. 1946), *aff'd*, 281 App. Div. 668, 117 N. Y. S. 2d 497 (1st Dep't 1952), *aff'd*, 305 N. Y. 479, 113 N. E. 2d 844 (1953), quoted with approval in *United States* v. *The Bayer Co.*, 135 F. Supp. 65, 69 (S. D. N. Y. 1955). It is conceded that these contracts were also in violation of section 1 of the Sherman Act, *supra*. They provided for a division of world sales territories in pharmaceuticals and other products for a minimum term of 50 years (App. 71a-98a).

It is undisputed that the 1920 Contract and the 1923 Contracts, as amended and supplemented, were substantially performed by both parties thereto and their successors from their effective date until some time in the summer of 1941.

I. G. Farben, which was organized in 1925 through a merger of Farbenfabriken vorm. Friedrich Bayer & Company and seven other German corporations, succeeded Farbenfabriken vorm. Friedrich Bayer & Company as a party to the 1920 Contract and the 1923 Contracts (App. 63a).

The Acquisition of Suarry and Hegemann.

In 1937 and 1938, in furtherance of and supplemental to the 1929 Contract, Farben and Bayer agreed to acquire two Latin American companies which were then engaged in competition with Bayer in the manufacture and sale of aspirin products in Latin America. These competitors were Laboratorios Suarry S.A. (hereinafter called "Suarry"), organized in Argentina, and Laboratorios Recalcine, organized in Chile (App. 66a-67a).

A 51% stock interest was acquired in Suarry (App. 67a), and substantially all of the assets of Laboratorios Recalcine were acquired (App. 66a). The business acquired from Laboratorios Recalcine was taken in the name of Laboratorios Hegemann y Cia., Ltda. (hereinafter called "Hegemann"), also a Chilean concern (*ibid.*).

Bayer, pursuant to the agreement between the parties, advanced the entire purchase price in both cases (App. 66a, 67a). Farben, which was to have a 75% share of the interests so acquired, was to pay its 75% share of the purchase price from its 75% share of their respective profits, and from its 75% share of the profits under the 1929 Contract arising from the sale of aspirin and aspirin compounds in Argentina and Chile, respectively (*ibid.*).

Investigations by the Government in 1941.

During 1941 the Antitrust Division of the Department of Justice conducted an investigation of Sterling over a five-month period under a grand jury subpoena (App. 15b). This investigation was conducted in the United States District Court for the Southern District of New York under the direction of Thurman Arnold, then head of the Antitrust Division and now counsel for Farben in the present case (*ibid.*).

After Mr. Arnold's investigation, Sterling entered into negotiations with him concerning the form of a decree that would meet his requirements to dispose of the antitrust problems (*ibid.*).

Proposed decrees were submitted by Sterling to Mr. Arnold early in August 1941 (*ibid.*). Mr. Arnold replied in a letter dated August 24, 1941, confirming statements made by him in a conference with Sterling on August 12, 1941. He stated:

> "It is the considered conclusion of this Department that it cannot accept the proposed form of decree in settlement of the questions which have arisen out of the investigation of Sterling Products (Incorporated) and its subsidiary companies now being conducted by the Antitrust Division. The investigation is particularly concerned with the following contracts: [all ten of the illegal contracts entered into between 1920 and 1938, including the 1920 and 1923 contracts, were identified].
>
> "*It is our view that all of these contracts are illegal in their entirety and that any consent decree entered in this case must declare the contracts to be illegal in their entirety and enjoin their future performance.* The proposed decree which you have submitted to us does not meet this requirement.
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> . . . . . .
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> "As we have previously indicated to you, the Department is always reluctant to discuss a consent decree settlement when an investigation looking toward a criminal proceeding has been initiated. Inasmuch, however, as your present proposal is unacceptable to us, we now shall have no recourse but to permit the criminal proceeding to take its normal course." (R. pp. 15b-16b).*

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* Emphasis supplied throughout this brief unless otherwise noted.

In accordance with Mr. Arnold's position that all the agreements were illegal and that all performance thereunder must be enjoined, the terms of the decrees to be entered were changed accordingly and thereafter cleared by Mr. Arnold (App. 16b).

In addition to the 1941 investigation by the Antitrust Division, an investigation of Sterling was also conducted during the spring and early summer of 1941 under the aegis of an Interdepartmental Committee consisting of representatives of the Departments of State, Treasury and Justice, functioning under Executive Order 8389, 5 Fed. Reg. 1400 (1940), the so-called "Freezing Order" of World War II Foreign Funds Control.

This Executive Order, as originally issued on April 10, 1940, prohibited certain transactions involving property in which Norway or Denmark or their nationals had an interest, and was promulgated for the purpose of protecting that property from claims or transfers arising from duress of the Nazi invaders of those countries.* On June 14, 1941, the scope of the Freezing Order was broadened by Executive Order 8785, 6 Fed. Reg. 2897, which (among other things) added the Axis nations to the list of blocked countries, and prohibited any transfers involving property in which a German national had a direct or indirect interest, or which were made pursuant to the direction of a German national. As the Treasury Department recognized, it had become apparent that the Freezing Order was "a sharp and valuable

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* Executive Order 8389 was issued pursuant to section 5(b) of the Trading with the Enemy Act, 40 Stat. 415 (1917), as amended, 50 U. S. C. App. §5(b) (1958). The purpose of this Executive Order was made apparent in Senate proceedings relating to the amendment of that section on May 7, 1940, 54 Stat. 179; 86 Cong. Rec. 5006-09, 5168-84 (1940); S. Rep. No. 1496, 76th Cong., 3rd Sess. (1940). See, also, 41 Col. L. Rev. 1039, 1042 (1941).

weapon of economic warfare with which telling blows could be struck at the Axis powers." Treasury Department, *Administration of Wartime and Financial Property Controls of the United States Government* 3 (1942).

Termination of the Relationship.

As will hereafter be shown in greater detail, this investigation culminated in demands by the Interdepartmental Committee that Sterling rid itself of all German influence and sever all contractual relationships with I. G. Farben, by (1) discharging the top executive officers of Sterling (under whose administration Sterling had entered into and performed its 1920 and 1923 contracts with I. G. Farben), (2) acquiring I. G. Farben's interest in certain Latin American companies, including Suarry and Hegemann, and (3) terminating forthwith Sterling's aspirin business in Latin America under the trademarks which were owned by I. G. Farben and licensed to Bayer under the 1920 Contract (App. 67a-68a, 100a-105a, 13b, 41b-45b, 49b-50b). It was made clear to Sterling that the alternative to compliance with these demands by the Interdepartmental Committee was that all of Sterling's bank accounts would be frozen and it would be put out of business (App. 36b, 38b, 48b, 50b-53b, 55b).

As one of its first steps in complying with the demands of the Interdepartmental Committee (App. 68a), on August 14, 1941, Sterling cabled Farben its offer to terminate the aspirin contract (App. 68a, 105a-106a). Upon Farben's rejection of that offer (App. 106a-107a), Sterling sent an additional cable (App. 107a), which was also rejected (*ibid.*).

On August 15, 1941, Sterling's Board of Directors adopted a resolution authorizing its officers to make certain Representations to the Interdepartmental Committee (App. 68a). These Representations were in words and substance

identical* to the draft Representations which Sterling had been handed by the Interdepartmental Committee on August 13, 1941 with the demand that they be duly made and carried out by Sterling in *haec verba*, or else the consequences referred to above would follow (App. 68a, 36b, 52b-53b).**

After submission to and clearance with the Interdepartmental Committee to insure that its terms would constitute compliance with Paragraph 1 of Sterling's Representations (App. 108a, 46b-47b), a decree was entered on September 5, 1941 in a civil action brought by the Department of Justice in the United States District Court for the Southern District of New York, *United States* v. *Alba Pharmaceutical Co., supra* (App. 68a, 113a-131a). Mr. Arnold consented to entry of the decree on behalf of the United States (App. 128a). Bayer, Sterling and certain affiliates of Sterling were made defendants (App. 68a, 113a). In addition, criminal proceedings were instituted against certain officers individually, as well as against the corporations, pleas of *nolo contendere* were filed and accepted, and fines were levied (App. 16b).

The decree declared the 1920 Contract "and all agreements amendatory or supplemental thereto" between the

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* With a single exception. Paragraph 8 of the Interdepartmental Committee's draft (App. 103a) would have required Sterling to exercise a degree of control over its exports forbidden by the antitrust laws (App. 49b). This paragraph was amended in the final Representations of August 15, 1941 and the remaining paragraphs were renumbered (App. 110a). App. 101a is a misprint and should be disregarded.

** None of the foregoing facts is seriously controverted in this case by Farben. Although Farben has "reserved its position" thereon for purposes of the Stipulation (see App. 67a-68a) the facts are established by the deposition of the late James Hill, Jr., Chairman of the Board of Sterling, which Farben took prior to Mr. Hill's death. The relevant portions of that deposition were included in Sterling's printed Appendix in the Court of Appeals, copies of which have been filed in this Court.

parties unlawful under the antitrust laws and enjoined Bayer from any further performance thereof (App. 123a).* Bayer was also compelled to terminate, prior to December 31, 1941, "all arrangements" with Farben "for the distribution of aspirin, aspirin compounds or other drug products pursuant to said * * * contract as amended or supplemented", and to surrender all licenses for the use of Farben's trademarks in Latin America (App. 123a-124a). All payments by Sterling to Farben of any royalties or shares of the profits under the 1920 Contract were prohibited (App. 124a).

On that same day, the Department of Justice issued a press release concerning the consent decrees, stating:

> "* * * that the American Government's recent policy of economic pressure against Axis powers affects private contractual obligations, entered into long before the war, with contracting parties who are now Axis nationals. That conflict has created difficult legal situations for American firms engaged in foreign trade and subject to the courts of foreign countries. The arrangements made in this case constitute a constructive solution of this type of difficulty.
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> * * * * * *
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> "Under terms of the consent decrees, signed by Judge Mandelbaum, *all agreements between Sterling and its subsidiaries, on one hand, and between I. G. Farben and its predecessors, on the other, are declared illegal and terminated.* The decrees further provide that Sterling and its subsidiaries shall not by agreement with any other manufacturer of drugs,

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*The decree simultaneously entered in a companion action entitled *United States* v. *The Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,151 (S. D. N. Y. 1941) declared the 1923 Contracts unlawful and enjoined their further performance. That decree is dealt with in the companion case in this Court (No. 653).

> including I. G. Farben, refrain from entering into any foreign market." (App. 16b-17b).

Shortly thereafter, on September 25, 1941, Mr. Arnold, as head of the Antitrust Division, added his own comments and issued a statement, which said in part:

> "The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.
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> • • • • • •
>
> "In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [petitioner's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*" (App. 17b-18b).

No further payment of profits under the 1920 Contract was made to Farben (App. 69a).

Pursuant to the *Alba* decree and the Representations to the Interdepartmental Committee, all (more than 300) licenses under I. G. Farben's trademarks were surrendered for cancellation to the United States Attorney General under covering letters of December 30, 1941 and January 7, 1942 (App. 69a, 132a-138a). Receipt of those licenses by the Attorney General was acknowledged in letters signed by Mr. Arnold and dated December 30, 1941 and January 9, 1942 (App. 69a). Mr. Arnold's letter of December 30, 1941 stated that:

> "The Department of Justice accepts your letter of December 30, 1941, and the documents enclosed

> therewith, as performance of the requirement of * * * the final judgment * * * that prior to December 31, 1941, the Bayer Company, Inc. surrender any and all licenses for the use of trademarks owned or controlled by I. G. Farbenindustrie A. G." (App. 20b).

The trademarks under which Farben had licensed Bayer were themselves subsequently seized by the various Latin American governments as enemy property (App. 69a).

In accordance with the *Alba* decree and the Representations, and after clearance with the Interdepartmental Committee (App. 108a), all assets of Suarry were sold on November 27, 1941 to a new company, S. A. Laboratorios Suarry, owned 86% by Sterling and in which Farben had no interest (App. 70a). Similarly, all assets of Hegemann were transferred on December 27, 1941 to a new company, Laboratorios Alivtol, Ltda., owned 100% by Sterling or its subsidiaries (*ibid.*).

The Writ Should Not Be Granted.

The record shows that Farben's complaint seeks to require Sterling to take steps which Sterling has since 1941 been compelled by the United States Government, through the Representations and the *Alba* decree, to *refrain* from taking.

Farben's first cause of action seeks the recovery of a share of profits alleged to be due under the 1920 Contract for the years 1940 and 1941 (App. 9a).

The second cause of action seeks a 75% share in Sterling's present Latin American aspirin business, on the theory that this business is the same as that conducted by

Bayer in 1941 (App. 12a). Since Farben's only interest* in relation to the business as conducted in 1941 was its right to collect 75% of the profits, it is apparent that this cause of action also seeks to recover profits.

The fourth** cause of action seeks a 75% share in the two new subsidiaries through which Sterling today conducts a part of its Latin American aspirin business and which succeeded to the businesses of Suarry and Hegemann. (App. 14a). Since Suarry and the assets transferred to Hegemann were purchased pursuant to agreements in furtherance of the unlawful enterprise, and since Farben's share of the purchase price was to be paid from 75% of the profits of the acquired business and from 75% of the profits of the balance of Bayer's aspirin business in Argentina and Chile, respectively, it is apparent that this cause of action, too, seeks to recover profits under the 1920 Contract.

Payment to Farben by Sterling of any of the profits under the 1920 Contract is flatly prohibited, both (1) by the Representations, which not only required Sterling immediately to terminate and cancel all contracts with Farben but also to market its products through sales organizations with no obligation to pay royalties or profits to Farben (App. 108a, 109a), and (2) by the *Alba* decree, which specifically enjoined Sterling "from paying any royalties or share of the profits pursuant to said Latin American contract as amended or supplemented" (App. 124a).

Farben contends that the second and fourth causes of action do not seek profits but only an accounting of "prop-

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* Other than its interest in its trademarks, its Latin American distributing agencies and its facilities in Germany for manufacturing aspirin powder, none of which has been used by Sterling since 1941.

** The third cause of action, which seeks damages for breach of the 1920 Contract, has been abandoned (Pet. 13, n. 6).

erty interests" (Pet. 12, 13). Just what these "property interests" could be is nowhere explained. However, even assuming that the second and fourth causes of action may seek something other than profits, any accounting by Sterling is still barred by the Representations and by the *Alba* decree.

The second cause of action charges that the Latin American aspirin business was entrusted to Sterling in early 1941 in order to protect it, and that it was thereafter appropriated by Sterling (App. 10a). Performance by Sterling of this alleged entrusting agreement is squarely forbidden by the Representations and by the *Alba* decree. The decree declared that the 1920 Contract, as well as "all agreements amendatory or supplemental thereto" were illegal, and enjoined Sterling and its affiliates and subsidiaries from further performance of all such agreements (App. 123a). Bayer was also directed to terminate "all arrangements" with Farben "for the distribution of aspirin, aspirin compounds or other drug products pursuant to said Latin American contract as amended or supplemented" (App. 123a-24a). The Representations not only required Sterling to terminate and cancel *all* contracts with Farben, as noted above, but compelled each director and officer of Sterling to furnish a sworn statement that Sterling had carried out that requirement and held no property of any kind in trust for Farben (App. 112a).

The fourth cause of action charges that Suarry and the assets transferred to Hegemann were acquired pursuant to agreements supplementary to the 1920 Contract and that Sterling holds 75% of the successors to their respective businesses in trust for Farben (App. 13a-14a). Transfer by Sterling to Farben of any interest (or the value thereof) in the successor concerns is not only barred by the provisions of the Representations and the *Alba* decree which

have already been noted, but by a provision in the Representations (with which Sterling complied) which expressly directed Sterling to submit for the Committee's approval, and thereafter to execute, plans "to obtain complete ownership" of Farben's interest in Suarry and Hegemann (App. 109a).

I.

The issues presented by the petition are not dispositive of the case.

The requested writ of certiorari should be denied because the issues presented by the Petition are not dispositive of the case.

The only aspect of the case which Farben has asked this Court to review is the determination of both courts below that the complaint must be dismissed because it seeks enforcement of an illegal contract. Sterling respectfully submits that dismissal of the complaint is required, regardless of that determination, on, *inter alia,* at least three separate and independent grounds.

A. Farben's Action is Barred by the Trading with the Enemy Act.

As pointed out above, each of the acts, or refusals to act, of which Farben complains were required of Sterling by the Interdepartmental Committee through the Representations and the *Alba* decree.*

The Committee derived its authority from section 5(b) of the Trading with the Enemy Act, *supra.* It had been

* The *Alba* decree was submitted to, and approved by, the Committee as providing for compliance by Sterling of paragraph 1 of the Representations, which required the immediate termination and cancellation of all contracts with Farben (App. 108a, 46b-47b).

established to administer the provisions of that section on behalf of the Secretary of the Treasury, to whom enforcement thereof had been entrusted by the President, Exec. Order No. 8389, *supra*, as amended by Exec. Order No. 8785, *supra*, §§5(E), 7, acting pursuant to Section 5(b).*

Sterling is therefore protected by paragraph (2) of Section 5(b), which provides:

> "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and *no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision [section (5b)], or any rule, regulation, instruction, or direction issued hereunder.*"

Subparagraph (1)(B) of section 5(b) of the Act empowered the President, through any agency designated by him to

> "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property

* Exercise of the President's powers under section 5(b) was limited to "time of war or * * * any other period of national emergency declared by the President", 48 Stat. 1 (1933), 50 U.S.C. App. §5(b)(1)(1958). A limited national emergency had been proclaimed on September 5, 1939, Proc. No. 2352, 4 Fed. Reg. 3851, and an unlimited national emergency had been proclaimed on May 27, 1941, Proc. No. 2487, 6 Fed. Reg. 2617.

> in which any foreign country or a national thereof has any interest." (55 Stat. 839 (1941), 50 U. S. C. App. §5(b)(1)(B) (1958)).

Section 5(b) was amended to read as set forth in the foregoing quotation by section 301 of the First War Powers Act, passed on December 18, 1941, 55 Stat. 839, 50 U. S. C. App. §616 (1958). This was subsequent to Sterling's execution of the Representations. However, the effect of the amendment was made retroactive by section 302 of that Act, which provided:

> "All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917, as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are approved, ratified, and confirmed." (55 Stat. 840 (1941), 50 U. S. C. App. §617 (1958)).

These enactments constitute a clear Congressional bar against prosecution of Farben's claims.

B. Farben's Action is Barred by the so-called "Bonn Convention" between the United States and the Federal Republic of West Germany.

Since Farben's claims arise wholly from measures required of Sterling by the Government of the United States, they are also barred by the so-called "Bonn Convention"*. This convention was one of the contractual agreements terminating the occupation of West Germany. Article 1 of Chapter Nine thereof provides as follows:

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* Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, [1955] 4 U. S. T. & O. I. A. 4504, 4411, T. I. A. S. 3425 (effective May 5, 1955).

> "Without prejudice to the terms of a peace settlement with Germany, German nationals who are subject to the jurisdiction of the Federal Republic shall not assert against countries which have signed or acceded to the United Nations Declaration of 1st January 1942, or have been at war with Germany, or are specified in Article 5 of Chapter Five of the present Convention, or against the nationals of such countries, *claims of any description arising out of actions taken or authorized by the Governments of these countries* between 1st September 1939 and 5th June 1945 *because of the existence of a state of war in Europe*, nor shall such claims be asserted in any court of the Federal Republic by any person."

C. Farben's Action is Barred by the Alternative Grounds Stated in Support of its Holding by the District Court.

In granting Sterling's motion for summary judgment, the District Court found one or more separate grounds for its decision with respect to each of Farben's causes of action.

Thus, the District Court held that the first, second and fourth causes of action, if construed as asserting claims at law, were barred by the statute of limitations (App. 290a; Pet. App. 32a, 33a), and, if construed as seeking equitable relief, were barred by the doctrine of laches (App. 290a, 291a; Pet. App. 32a, 33a-34a). In addition, it found the first cause of action, which seeks the recovery of profits under the 1920 Contract, to be barred by the *Alba* decree (App. 279a; Pet. App. 20a). Further, it ruled the second cause of action, which asks an accounting of a 75% interest in the aspirin business on the theory that it was conducted as a joint venture, to be barred because the record shows conclusively that no joint venture existed (App. 280a-81a; Pet. App. 22a-23a). Finally, the basic premise of Farben's case, i. e., that the 1920 Contract established a joint venture,

was rejected not only by the District Court (App. 280a-81a; Pet. App. 22a-23a) but by the unanimous opinion of the Court of Appeals (Pet. App. 6a).

None of the foregoing separate grounds supporting the decisions below is now presented for this Court's review. Thus, even if the Court were to grant the requested writ of certiorari, and even if it were to reach a decision different from that of the courts below concerning the effect of the illegality of the 1920 Contract, Farben's claims would still be barred.

II.

The decisions below do not conflict with this Court's decision in *Kelly* v. *Kosuga*.

Farben asserts that the decisions below conflict with "the consistent line of decisions of this Court" (Pet. 18) which allegedly culminates in *Kelly* v. *Kosuga*, 358 U. S. 516. According to Farben, those cases direct a recovery on the illegal 1920 Contract because the only effect will be the transfer of a sum of money, and neither party will be forced to engage in an unlawful activity.

Yet this is precisely what was condemned in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227. There, plaintiff, a member of an illegal combination, sought to recover the balance of the artificially high price of wallpaper sold by the combination to defendant. Recovery was denied. Said this Court:

> "The present suit is • • • based • • • upon agreements, to which both the plaintiff and the defendants were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends • • •. If judgment be

given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." (212 U. S. at 261).

This Court's decision in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, is similarly applicable. There Pullman had acquired the rolling stock, contracts and cash of Central Transportation under an illegal lease. Central's demand for the payments specified in the lease was rejected, this Court declining to "infuse any vitality" (*id.* at 61) into the illegal agreement.

Sterling submits that, particularly in the light of *Continental* and *Central Transportation*, neither the facts nor the decision in *Kelly* supports Farben's claim. There the plaintiff sought the balance of the purchase price of 50 railroad cars of onions. A defense was interposed that the sale was made pursuant to, and as an indivisible part of, an agreement in violation of section 1 of the Sherman Act, *supra*. The facts alleged in the answer, which were taken as true for purposes of plaintiff's motion to strike the defense, were that both plaintiff and defendant were marketers of onions, and that plaintiff and his associate had informed defendant and others that they owned or controlled 1,000 cars of onions which they would deliver on the futures exchange for the purpose of depressing the futures price and the cash market price of onions, unless defendant and others agreed to purchase a substantial part thereof.

Defendant and the others therefore agreed to purchase the required amount, and plaintiff and his associate agreed to withhold deliveries from the futures market for the balance of the trading season. Defendant and the other purchasers agreed themselves not to deliver any of the

onions purchased from plaintiff and his associate on the futures market for the remainder of the season; this was done "for the purpose of creating a false and fictitious market condition", and "to fix the price of onions and limit the amount of onions sold." (358 U. S. at 517).

Defendant had taken delivery of some, but not all, of the purchased onions, and had also made some payments on account of the sale. The District Court entered summary judgment for the plaintiff for the unpaid purchase price; its decision was affirmed by the Court of Appeals for the Seventh Circuit and by this Court.

It is difficult to see the applicability of *Kelly* to the instant situation. That case involved a suit on a simple purchase and sale agreement, fully completed except for defendant's refusal to pay. Thus the Court, at the outset of its discussion of the legal principles involved, noted:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser *in an action to recover* from him *the agreed price of goods sold.*" (*Id.* at 518).

There is no sale of goods before this Court in this case. The facts of *Kelly* are analogous to the situation which might have arisen if, in the 1920's or the 1930's, prior to the *Alba* decree, Bayer had refused to pay for aspirin powder manufactured in Germany and delivered to Latin America for Bayer's account under the 1920 Contract. Such a simple situation of goods sold and delivered would have come within the careful language of the Court, which emphasized that the transaction before it was confined to "a lawful sale for a fair consideration [which] constitutes an intelligible economic transaction in itself * * *." (*Id.* at 521). The

contrast between such a transaction and the complex of claims arising from Farben's 21-page complaint is obvious.

The Court's decision in *Kelly* was based on its refusal to add a new sanction, *i.e.*, the avoidance of private contracts, to the antitrust sanctions explicity set forth in the Sherman Act, except where doing so is necessary to avoid enforcement of unlawful conduct. It said:

> "Past the point *where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act*, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it'. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra*, at 271 (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 754-54, is avoided by treating the defense [of illegality] as so confined." (*Id.* at 520-21).

First, of course, avoidance by Sterling of the terms of the 1920 Contract is not the imposition of a new sanction. A new sanction would be imposed only if Farben's claims were upheld. Those claims necessarily rest upon Sterling's refusal, following entry of the *Alba* decree in 1941, to continue any longer in an admittedly illegal long-term and largely executory contractual relationship. To afford Farben relief would be to impose a penalty upon Sterling for *refusing* to engage in "the precise conduct made unlawful by the Act."

Second, as will be shown under Point III, *infra*, the Holmesian principle stated above is not involved in this case because Sterling has already given back to Farben what Farben contributed under the 1920 Contract.

Third, in the present case the "judgment of the Court [sought by Farben] *would* itself be enforcing the precise conduct made unlawful by the Act," *i.e.*, the payment of money for illegal consideration. *Kelly* involved, as pointed out, *supra*, a simple sale of goods of the type continuously entered into in the marketplace. There was no allegation that the price sued for was unreasonable or had been unlawfully fixed; on the contrary, the Court found before it "a completed sale of onions at a *fair* price." (*Id.* at 521). The problem with which the Court was concerned arose only out of the background against which the sale was made. The plaintiff in *Kelly* did not seek to enforce the unlawful non-delivery agreement. Had such a request been made, the Court noted that it would have been denied.

Here, it is precisely such enforcement of the unlawful contract that is requested. By the terms of the 1920 Contract, Farben refrained from further competiton in Latin America with Sterling, in return for a share of Sterling's profits. An illegal enterprise resulted, which developed, as Farben admits, "a large and profitable business" (App. 8a). Claiming that the enterprise still exists, Farben now brings an action for an accounting of the alleged spoils under the illegal 1920 Contract, which is pleaded in each of its causes of action. This Court cannot uphold the accounting sought by Farben without recognizing, reviving and enforcing that illegal agreement, and without using its judicial power to reward the very conduct proscribed by the antitrust statutes.

This is just what was condemned in *Continental*. There the Court held that judgment for the excessive purchase price fixed pursuant to an unlawful conspiracy would have made the Court a party to the carrying out of one of the very restraints forbidden by the Sherman Act. The *Con-*

tinental doctrine was expressly reaffirmed by the Court in *Kelly*.

In an effort to distinguish *Continental* and *Central Transportation*, Farben asserts that the only illegal consideration exchanged in the 1920 Contract was Sterling's, not Farben's, covenant not to compete (Pet. 19, 23). However, as pointed out in Point III, *infra*, the 1920 Contract was a part of a world-wide division of pharmaceutical markets and Farben's participation therein was equally unlawful.

Fourth, in *Kelly* the Court gave great weight to the practical difficulties inherent in permitting a private party to avoid an obligation to pay for goods sold and delivered on the ground that the contract pursuant to which the goods were sold and delivered was in some way in violation of the antitrust laws, citing *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, another decision which permitted recovery of the purchase price of goods sold and delivered. There Mr. Justice Jackson pointed out that the sanction of denying the purchase price under contracts in violation of the antitrust laws would not only end the business of antitrust violation; it would end all business. Were the defense to be sustained, every suit for goods sold and delivered would be converted into an antitrust proceeding, thus imposing an impossible burden upon the conduct of business. The result in *Kelly*, then, is in part attributable to practical reasons and should not be deemed controlling when the practical reasons are absent.

III.

The decisions below have no undesirable effect on international trade.

Farben claims (Pet. 26) that it could not have known of the illegality of the 1920 Contract at the time of its execution. The argument is made that American antitrust law did not then forbid an agreement between American and foreign firms to refrain from competing with a joint business enterprise conducted by them in a third country (*ibid.*).

Farben seeks to treat the 1920 Contract as if it were executed as an isolated transaction. That contract, however, was only the first of a series of steps by Farben and Sterling to accomplish a division of the world's pharmaceutical markets, which division was completed with execution of the 1923 Contracts. Sales by Bayer of aspirin in Latin America under the 1920 Contract were specifically recognized in the 1923 Contracts (*e.g.*, App. 86a).

Certainly the relationship among the contracts was clear in 1941 to the Department of Justice, acting through Mr. Arnold, and to the United States District Court for the Southern District of New York. The complaint filed by the Department of Justice and signed by Mr. Arnold (App. 113a-21a) charged that a conspiracy in restraint of trade had existed and that *both* the 1920 Contract and the 1923 Contracts had been executed in furtherance of that conspiracy (App. 117a-19a). The decree, also signed by Mr. Arnold (App. 128a), declared all of the contracts unlawful (App. 123a, 124a).

That these contracts were regarded as particularly flagrant breaches of the antitrust laws in 1941 is evidenced by the fact that in addition to the civil suits in which consent

decrees were entered, criminal proceedings were instituted by the Antitrust Division under Mr. Arnold's direct supervision against Sterling, and against its top executives individually. In the criminal cases, pleas of *nolo contendere* were filed and accepted, and fines levied (App. 16b).

Farben not only claims that the 1920 Contract must be examined standing alone; it also argues (Pet. 19, 23) that the only illegality of that agreement inhered in Sterling's covenant not to compete, and that apart from Sterling's covenant Farben's own participation did not violate the antitrust laws. This argument, too, has been previously refuted by Mr. Arnold. In a press release issued September 5, 1941, the date of entry of the consent decrees, he stated the following as the view of the Department of Justice:

> "It is our view that all of these contracts are illegal *in their entirety* and that any consent decree entered in this case must declare the contracts to be illegal *in their entirety* and enjoin their future performance." (App. 16b).

Even if Farben could establish that at all times it was ignorant of the illegality of the 1920 Contract under the United States antitrust laws, it could not prevail. A similar allegation was rejected by the courts below in *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F. R. D. 349 (D. N. J. 1948), *aff'd*, 176 F. 2d 90 (3rd Cir. 1949). There plaintiff sought the reformation of an agreement licensing it to use certain patents and containing price-fixing provisions in violation of the Sherman Act. Despite plaintiff's allegation that it accepted the patent license not only in ignorance of the Act but also in reliance upon defendant's representation that the license was lawful, reformation was refused. Said the District Court:

> "Is it an avoidance or a sufficient answer in law to allege that one entered into a contract in good

faith, but in ignorance of the law making the contract void as against public policy? The answer to this is no; ignorance of the law, under such conditions, is no excuse. 'Acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.' United States *v.* Paramount Pictures, 334 U. S. 131, 68 S. Ct. 915, 931.

"* * * Nor is plaintiff's position strengthened by alleging that it relied upon defendant's assertion that the agreement was valid, since the Sherman anti-trust law speaks in the public interest to the contrary and in a louder and more commanding voice." (8 F. R. D. at 353-54).

Finally, Farben is simply wrong when it construes the decisions below as permitting the appropriation by one party to an enterprise of contributions by another party. The record shows conclusively that Sterling no longer has anything provided by Farben under the 1920 Contract.

The only contributions made by Farben to the aspirin business conducted by Bayer were licenses under certain of its trademarks (App. 15a), the use (for which Bayer paid) of Farben's local Latin American agencies and its manufacturing facilities in Germany (App. 16a, 17a), and its covenant not to compete (App. 16a, 18a).

It has been stipulated that Bayer's licenses under Farben's trademarks were disclaimed by January 7, 1942 (App. 69a, 132a-38a). It has also been stipulated that, at about the same time, Bayer terminated its use of Farben's agencies (App. 70a). Sterling obviously does not now have, and has not had since 1939 (App. 64a), the use of Farben's manufacturing facilities. Finally, with respect to Farben's covenant not to compete, Sterling is of course barred from enforcing that covenant by the provisions of the Representations and the *Alba* decree, and no claim of actual enforcement is made by Farben.

Rather than permitting, the decisions below prevent the appropriation by one party of another party's property. Sterling was compelled in 1941 to surrender without compensation the licenses under Farben's trademarks for which it had already paid. For all practical purposes, this gave Sterling's aspirin business to Farben for nothing. Farben was unable to realize the benefit of this surrender only because of World War II. Since 1941 Sterling has built a new business under new trademarks. It is this business which is sought to be appropriated by Farben.

In these circumstances, it is apparent that the decisions below have no undesirable effect on international commercial relationships, and review by this Court is not warranted.

Conclusion.

For the reasons stated, the writ should be denied.

Respectfully submitted,

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January 10, 1963.